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CASE NO:
APPELLATE NUMBER: 79-5730

in the Supreme Court of the United States

PATRICK LORING ROBINSON and
MATTHEW WILFORT MADSEN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

Whether the out of court declarations and confessions of a co-defendant admitted pursuant to Federal Rules of Evidence 804(b)(3) violated the defendants' sixth amendment right to confrontation?

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PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above styled case on January 26, 1981. Rehearing was denied March 4, 1981.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is printed at F.2d and is printed in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 26, 1981. Rehearing was denied March 4, 1981. The jurisdiction of this Court is invoked under 28 USC 1254.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

The Petitioners herein, PATRICK LORING ROBINSON and MATTHEW WILFORT MADSEN, along with co-defendants, Kenneth W. Register, Thomas Henry DeLoach, James Mann Erwin and Jerold Emery Anderson were brought to trial pursuant to an indictment returned by the Grand Jury on August 14, 1979 charging Petitioner, ROBINSON with kidnapping, possessing and distributing narcotics, and controlled substances and Petitioner, MADSEN, with kidnapping and possessing a controlled substance with intent to distribute. (R-8)

Trial commenced on December 3, 1979. The jury returned a verdict on Petitioner, ROBINSON of guilty on Counts III and IX and a verdict on Petitioner, MADSEN of guilty on Count III only. (R-118, 127). None of the remaining co-defendants were convicted. Notice of Appeal was timely filed on December 11, 1979. (R-121)

Judgment was affirmed by the Fifth Circuit Court of Appeals on January 26, 1981. The Court in part ruled that the admission of a co-defendant's confession which implicated the Defendants could properly be admitted at trial even in the absence of the declarant taking the stand and being available for cross examination, based upon *United States v. Alvarez*, 584 F.2d 694 (5th Cir. 1978). In particular, the Court ruled that there is no conflict between the admission of declarations against penal interest as provided for in Federal Rules of Evidence 804(b)(3) and the Defendants' Sixth Amendment right to confrontation. Motion for rehearing en banc was denied on March 4, 1981. This Petition for Writ of Certiorari follows:

STATEMENT OF THE FACTS

The facts which form the basis upon which Certiorari is sought are fully set forth in the Circuit Court decision. "The declarant, Quick, plainly was unavailable as a witness. Quick had been convicted on the same conspiracy charge (before the same trial judge) a month earlier; he was called as a prosecution witness in Appellant's case and invoked the Fifth Amendment. He was, immediately, granted immunity, but still refused to testify, deciding, apparently, that he was better off going to jail for contempt then testifying." The trial court, pursuant to Federal Rules of Evidence 804(b)(3) then admitted, "an out of court statement of one, Jack Quick made to two FBI agents." The Petitioners submitted at trial and continued to submit on appeal that the introduction of said out of court statements made by Jack Quick, although admissible under Federal Rules of Evidence 804(b)(3), were still in violation of their Sixth Amendment rights to confrontation.

ARGUMENT

THE OUT OF COURT DECLARATIONS AND CONFESSIONS OF A CO-DEFENDANT ADMITTED PURSUANT TO FEDERAL RULES OF EVIDENCE 804(b)(3) VIOLATED THE DEFENDANTS' SIXTH AMENDMENT RIGHT TO CONFRONTATION.

The right of confrontation has long been recognized to be one of the most cherished rights exercised by United States citizens and residents. "The right of confrontation is an essential and fundamental requirement

for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, L.Ed.2d 923 (1965). "The right of confrontation is basically a trial right. It includes both the opportunity to cross examine and the occasion for the jury to weigh the demeanor of the witness." *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968). "One of the important objects of the right of confrontation was to guarantee that the fact finder had an adequate opportunity to access the credibility of the witness." *Berger v. California*, 393 U.S. 314, 89 S.Ct. 540, 21 L.Ed.2d 508 (1969). It is through this right of confrontation and cross examination that the jury must evaluate the credibility of the evidence presented.

Obviously, the right of confrontation is not all encompassing since such an interpretation would require all hearsay statements to be declared unconstitutional. However, neither is the inter-relationship between the hearsay rule and the right of confrontation totally overlapping. As announced by the United States Supreme Court in *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970):

> While it may readily be conceded that heresay rules and the confrontation clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete ad that the confrontation clause is nothing more or less than a codification of the rules of hearsay and the exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation

of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.

The question raised in these proceedings is the interrelationship between the Defendants' right of confrontation as guaranteed by the Sixth Amendment to the United States Constitution, and Federal Rules of Evidence, Rule 804(b)(3). Rule 804(b)(3) provides for the admission of declarations against penal interest. This statutory exception to the hearsay rule was not recognized at common law and did not exist until the passage of the Federal Rules of Evidence in 1975. This rule, however, directly conflicts with both prior and post United States Supreme Court decisions which have considered the scope of the confrontation clause.

It has long been recognized that the out of court confession or declaration of a co-defendant may not be utilized against the defendant in the absence of the declarant taking the stand and being subject to cross examination. *Brookhart v. Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314, (1966); *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). The declaration of co-conspirators is only admissible when the declaration of each co-conspirator is considered to be the statement of all under agency law. *Anderson v. United States*, 417 U.S. 211 94 S.Ct. 2253, 41 L.Ed.2d 20 (1974). Thus, "a co-conspriators hearsay statements may be admitted against the accused for *no purpose whatever*, unless made during and in furtherance of the conspiracy." *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Nor does the fact that the officer to whom the statement of the co-defendant had been made was subject to cross examination alter the defendants' right to confrontation of the declarant. For example, in *Douglas v. Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L.Ed.2d 934 (1965) a statement of a co-defendant who refused to testify at the time of trial was utilized. The court emphatically ruled that, "since (the law enforcement officers) evidence tends to show only that (co-defendant) made the confession, cross examination of them as to its genuiness could not substitute for cross examination of (co-defendant) to test the truth of the statement itself."

In evaluating the defendants' right to confrontation when a co-defendant's confession is utilized, the court recognized that the introduction of the co-defendants' confession was improper. *Bruton v. United States*, 391 U.S. 123 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). "The statement was . . . admissible against the declarant . . . There is not before us, therefore, any recognized exception to the hearsay rule insofar as Petitioner is concerned and we initimate no view whatever that such exceptions necessarily raise questions under the confrontation clause." See note three.

In an attempt to create a new exception to the hearsay rule, Federal Rules of Evidence 804(b)(3) was created. Under said rule, declarations against penal interest may now be introduced in a court of law as an exception to the hearsay rule. This statute, however, does not and cannot address itself to the limited applicability of declarations against penal interest in criminal trials, when used in violation of a defendant's right to confrontation. It must be noted that it is only

when the government attempts to utilize declarations against penal interest in criminal prosecutions that the conflict with confrontation arises.

Although, the legislature has attempted to create a new exception to the hearsay rule, and arguably to the right of confrontation, said exception has not yet been recognized by the United States Supreme Court in its case law decisions. Rather, the court has ruled that, "traditional 'exceptions' to the hearsay rule, which permit the introduction of evidence despite the absence of the declarant . . . dispensing altogether with the literal right to 'confrontation' and cross examination, had been subjected on several occasions to careful scrutiny by the court." *California v. Green, supra.* This declaration against penal interest exception is not a long standing or historically recognized exception which was already in existence at the time the Sixth Amendment was framed. It is not an exception which the founding fathers accepted as an exception to the right of confrontation. As such, the creation of this new exception to the right of confrontation can only be made by the United States Supreme Court after careful scrutiny. See *California v. Green, supra.*

In the case at bar and in *United States v. Alvarez,* 584 F.2d 694 (5th Cir. 1978), the Fifth Circuit Court of Appeals has recognized a declaration against penal interest as an exception to the right of confrontation where the underlying declaration is sufficiently reliable. This evaluation is based upon the United States Supreme Court case of *Dutton v. Evans,* 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970). It must first be pointed out that reliance upon *Dutton v. Evans, supra.*, for the creation of a new exception to the confrontation clause is

procedurally invalid since the case cannot be relied upon under the doctrine of stare decisis. In particular, there was no majority opinion in *Dutton v. Evans, supra.* Rather, the opinion upon which the Fifth Circuit places reliance is nothing more than a plurality opinion. In the absence of a majority opinion, as opposed to a plurality opinion, *Dutton v. Evans, supra.*, has no precedential value and no stare decisis effect. See *United States v. Hill*, 626 F.2d 429 (5th Cir. 1980), footnote 6; *United States v. Pink*, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed.2d 796 (1942); *Hertz v. Woodman*, 218 U.S. 205, 30 S.Ct. 621, 54 L.Ed.2d 1001 (1910); *United States Exrel Radich v. Criminal Court of City of New York*, 459 F.2d 745 (2nd Cir. 1972); and *United States v. Friedman*, 528 F.2d 784 (10th Cir. 1976).

It must further be pointed out that the plurality opinion in *Dutton v. Evans, supra.*, merely recognized the state court (Georgia) definition of co-conspirators' statement which was broader than the federal definition. Since the Supreme Court had previously recognized the admissibility of co-conspirators' statements made during the commission of the conspiracy; *Wong Sun v. United States, supra.*, and *Anderson v. United States, supra.;* no new law was actually announced by the court. In addition, the statement which was ultimately admitted in no way directly implicated the defendant therein in criminal activity. The confession of Jack Quick admitted in the case at bar clearly and directly implicated these defendants' in criminal activities.

If the admissions and confessions of co-defendants can be utilized in criminal prosecutions against Defendants under the Fifth Circuit's interpretation of *United States v. Alvarez, supra.*, the exception has swallowed the

rule. Generally, the statements and confessions of a co-defendant are not admissible against the defendant in the absence of the declarants testifying. *Brookhart v. Janis, supra.; Gilbert v. California, supra.; Douglas v. Alabama, supra.;* and *Bruton v. United States, supra.* However, by definition, all confessions or statements made by a co-defendant which reflect his involvement in a crime are against his penal interests. Thus, if statements against penal interest are admissible, Federal Rules of Evidence 804(b)(3) has in effect overruled all the prior case law in this area of confrontation as announced by the United States Supreme Court. Clearly, such has not happened.

As late as 1979, the United States Supreme Court has reaffirmed the inadmissibility of co-defendants out of court statements and further reaffirmed the express dictates as announced in *Bruton v. United States, supra. Parker v. Randolph,* 442 U.S. 62 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979). Although the *Bruton* issue of joint trial is not presented in this case, the law upon which *Bruton* is based, i.e., the admissibility of out of court declarations of co-defendants, is the total basis of defendants' argument herein.

In addition, it must be noted that the sole United States Supreme Court case which has alluded to the inter-relationship between the confrontation clause and declarations against penal interest expressly refused to decide the issue. *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

Thus, it is the defendants' contention that the right to confrontation survives the hearsay exception

of statement against penal interest created by Federal Rules of Evidence, Rule 804(b)(3). Said right of confrontation has long prohibited the utilization of an out of court statement made by a co-defendant. *Brookhart v. Janis, supra.; Gilbert v. California, supra.;* and *Douglas v. Alabama, supra.* And, said right of confrontation has still been recognized by the United States Supreme Court even after the creation of the new legislation. See *Parker v. Randolph, supra.*

CONCLUSION

Based upon the foregoing citations, reasons, and theories, the Petitioners respectfully request this Honorable Court to grant it Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITION OF WRIT OF CERTIORARI was furnished by U.S. mail to DEBORAH WATSON, Department of Justice, Washington, D.C. 20530, DENVER RAMPEY, ESQUIRE, UNITED STATES ATTORNEY, Macon, Georgia 31202 and OFFICE OF THE SOLICITOR GENERAL, Washington, D.C. this 24 day of March 1981.

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Appendix

Opinion of the Fifth Circuit Court of Appeals

UNITED STATES of America,
Plaintiff-Appellee,

v.

Patrick Loring ROBINSON and
Matthew Wilford Madsen,
Defendants-Appellants.

No. 79-5730
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Unit B

Jan. 26, 1981.

Defendants were convicted before the United States District Court for the Middle District of Georgia, J. Robert Elliott, J., of conspiracy to possess marijuana with intent to distribute, with one defendant also convicted of using a facility in interstate commerce with intent to carry on illegal distribution of narcotics, and defendants appealed. The Court of Appeals held that: (1) statement of previously convicted coconspirator implicating defendants was properly admitted under hearsay exception, and (2) evidence that after the transaction fell apart defendants and others "kidnapped" one

individual to hold him hostage until the marijuana or previously paid purchase price was obtained was admissible.

Affirmed with instructions.

1. Criminal Law— 417(15), 419(5)

It was not error to admit, pursuant to hearsay exception, out-of-court statement made by one coconspirator to two FBI agents where despite immunity the declarant refused to testify when called as prosecution witness in defendants' case, in the statement he squarely implicated himself and defendants in subsequent conspiracy and such statement was trustworthy as it was taken in his own office when he was not in custody and had not been promised leniency if he would inculpate others and statement was fully corroborated. Fed. Rules Evid. Rule 804(b)(3), 28 U.S.C.A.

2. Criminal Law— 662(1)

Since coconspirator's hearsay statement implicating defendants was clearly against declarant's penal interest and was completely corroborated, its admission did no violence to defendant's Sixth Amendment right to confrontation. Fed. Rules Evid. Rule 804(b)(3), 28 U.S.C.A.; U.S.C.A. Const. Amend. 6.

3. Criminal Law— 338(7)

Evidence that after subject marijuana transaction fell apart when the marijuana was not delivered, the defendants and others "kidnapped" another individual

to hold hostage until the marijuana or their money was obtained was not inadmissible as extrinsic to the charge of conspiracy offense, i.e., conspiracy to possess marijuana with intent to distribute; such evidence was highly probative of the conspiracy and extent of defendants' interests therein and was probative of specific intent and corroborated separately tried co-conpirator's statement. Fed.Rules Evid. Rule 403, 28 U.S.C.A.; Comprehensive Drug Abuse Prevention and Control Act of 1970, §406, 21 U.S.C.A. §846.

Appeals from the United States District Court for the Middle District of Georgia.

Before TJOFLAT, VANCE and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

Both appellants were convicted of conspiracy to possess 1000 pounds of marijuana with intent to distribute, 21 U.S.C. §846 (1976); appellant Robinson also was convicted of using a facility in interstate commerce with the intent to carry on the illegal distribution of narcotics, 18 U.S.C. §1952(a)(3) (1976). Appellants advance two points on this appeal: first, that the district court erred in admitting, pursuant to the hearsay exception of Fed.R.Evid. 804(b)(3), an out-of-court statement of one Jack Quick made to two FBI agents; second, that the trial court erred in admitting evidence of events allegedly constituting a second, distinct conspiracy that took place following the conclusion of the conspiracy charged in the instant case. Both points lack merit and warrant only brief discussion here.

[1,2] Rule 804(b)(3) authorizes a trial judge to admit, as an exception to the hearsay rule, "[a] statement which . . . at the time of its making . . . so far tended to subject [the declarant] to . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true," provided that the declarant is "unavailable as a witness." The declarant, Quick, plainly was unavailable as a witness. Quick had been convicted on the same conspiracy charge (before the same trial judge) a month earlier; he was called as a prosecution witness in appellants' case and invoked the fifth amendment. He was, immediately, granted immunity but still refused to testify, deciding, apparently, that he was better off going to jail for contempt than testifying.

The statement was also plainly against the declarant's penal interest; he squarely implicated himself, and appellants, in the conspiracy charged in the indictment. The statement was introduced, through the agents, in Quick's trial on the charge, because it was probative of the conspiracy and his complicity in the offense.

Finally, there was ample evidence to corroborate the declarant's statement, authorizing the trial judge to find it to be trustworthy within the meaning of our holding in *United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978), that "hearsay testimony is admissible under Rule 804(b)(3) only if 'corroborating circumstances clearly indicate the trustworthiness of the statement.' " Quick's statement was taken in his own office; he was not "in custody" at the time. Quick was told that he was a suspect in the conspiracy and was given a *Miranda* caution. The agents made no promises; they gave Quick

no reason to believe that it would help him with the government if he inculpated others, such as the appellants; Quick never attempted to shift the balance elsewhere. In short, Quick made a knowing and voluntary statement, one subsequently determined by the trial judge to be worthy of admission against Quick himself. When Quick's statement was offered against appellants, the trial judge found that the statement was fully corroborated by the totality of the evidence in the appellants' case and that the evidence developed at Quick's trial reinforced this finding. "The consideration of (an out-of-court) statement's trustworthiness raises a question of fact ordinarily to be reviewed according to a clearly erroneous standard," *United States v. Alvarez*, 584 F.2d at 694, 701, and we cannot say that the trial judge's finding of trustworthiness in this case can be overturned under that standard. Moreover, the admission of a rule 804(b)(3) hearsay statement so clearly against the declarant's penal interest and so completely corroborated as this one was does no violence to the defendant's sixth amendment right to confrontation.

[3] The evidence at trial established that, on August 18, 1978, the marijuana transaction the appellants, and others, had conspired to consummate fell apart; the marijuana, which had been paid for, was not delivered as planned. The government sought to establish that the conspirators, including appellants, continued through August 19 to locate the marijuana or to retrieve their money. In the process, the appellants, and others, "kidnapped" one Carl Roberts and took him to Quick's farm; their purported intent was forcibly to hold Roberts hostage there until the marijuana (or their money) was obtained. The appellants contend that this evidence is

inadmissible as extrinsic to the charged conspiracy offense; implicit in their contention is that any probative value the evidence may have had was "substantially outweighed by the danger of unfair prejudice." Fed.R.Evid. 403. We think the evidence was highly probative of the conspiracy and the extent of appellants' interest in it. It was probative, also, of specific intent, an important element of the offense. Finally, it was corroborative of Quick's statement to the FBI agents implicating himself and the appellants in the illicit venture. In sum, appellants' claims of error are meritless.

Since the imposition of sentence, the Supreme Court has held that it is improper for a court to sentence defendants found guilty of the charged conspiracy offense to a special parole term. *Bifulco v. United States*, _____U.S._____, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980). Accordingly, the district court, following the issuance of the mandate, must amend appellants sentence to delete the special parole terms.

AFFIRMED with instructions.